

ROBERT W. SHIMER, ESQ., *pro se*

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

COMMODITY FUTURES TRADING :
COMMISSION, : Hon. Robert B. Kugler
 :
Plaintiff, :

vs. **Civil Action No. 04-1512**

EQUITY FINANCIAL GROUP LLC, TECH
TRADERS, INC., TECH TRADER, LTD.,
MAGNUM CAPITAL INVESTMENTS, LTD.,
VINCENT J. FIRTH, ROBERT W. SHIMER,
COYT E. MURRAY, & J. VERNON ABERNETHY

Defendants.

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**PROPOSED ORDER GRANTING DEFENDANT ROBERT W. SHIMER’S
MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF
CAN BE GRANTED AND MOTION FOR SUMMARY JUDGMENT**

Having read the Brief filed in support of Defendant’s Motion To Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted and Defendant’s Motion For Summary Judgment and accompanying Affidavit and Statement of Uncontested Facts and having reviewed and considered Plaintiff’s response thereto;

THE COURT FINDS:

1. With respect to Counts I & II of Plaintiff’s First Amended Complaint, alleging violations of Sections 4b(a)(2), 13(b) and 4o(1) of the Commodity Exchange Act by Defendant Robert W. Shimer (“Shimer”) Defendant’s Motion to Dismiss for Failure To State A Claim Upon Which Relief Can Be Granted is appropriate and is hereby granted to Defendant Shimer for the reason that by application of the required four part test set forth in controlling case law defendant Shimer’s client Shasta Capital Associates, LLC (“Shasta”) is not a commodity pool and,

therefore, Defendant Shimer's client Equity Financial Group, LLC ("Equity") is not a commodity pool operator nor are Shasta's members commodity pool participants as specifically alleged with respect to the conduct of defendant Shimer in said Counts I and II. Defendant Shimer cannot, therefore be held to have violated any of the above provisions of the Commodity Exchange Act as alleged by Plaintiff and the relief, therefore, requested in Plaintiff's First Amended Complaint with respect to Defendant Shimer's violation of the Commodity Exchange Act as alleged in Counts I & II cannot be granted.

2. With respect to Count III of Plaintiff's First Amended Complaint which alleges a violation of Section 13(b) of the Commodity Exchange Act in that defendant Shimer did not act in good faith and allegedly induced defendant Equity's alleged violation of Section 4m(1) by failing to register as a commodity pool operator and, with respect to Plaintiff's further allegation in Count III that defendant Shimer aided and abetted defendant Equity's violation of Section 4m(1) in violation of Section 13(a), Defendant's Motion to Dismiss for Failure To State A Claim Upon Which Relief Can Be Granted is appropriate and is hereby granted to Defendant Shimer for the reason that by application of the required four part test set forth in controlling case law defendant Shimer's client Shasta is not a commodity pool and, therefore, defendant Shimer's client Equity is not a commodity pool operator as alleged by Plaintiff and the relief, therefore, requested in Plaintiff's First Amended Complaint with respect to Defendant Shimer's violation of the Commodity Exchange Act as alleged in Count III cannot be granted.

3. With respect to Count IV of Plaintiff's First Amended Complaint alleging a violation of Section 4k(2) of the Commodity Exchange Act in that defendant Shimer did not register as an AP of defendant Equity Financial Group, LLC Defendant's Motion to Dismiss for Failure To State A Claim Upon Which Relief Can Be Granted is appropriate and is hereby granted to Defendant Shimer for the reason that by application of the required four part test set forth in controlling case law defendant Shimer's client Shasta is not a commodity pool and, therefore, defendant Shimer's client Equity is not a commodity pool operator as alleged by Plaintiff in Count IV and the relief, therefore, requested in Plaintiff's First Amended Complaint with respect to Defendant Shimer's violation of the Commodity Exchange Act as alleged in Count IV cannot be granted.

4. With respect to Count V of Plaintiff's First Amended Complaint alleging a violation of Section 13(a) of the Commodity Exchange Act in that defendant Shimer allegedly aided and abetted defendant Techs' violation of 17 C.F.R. § 4.30 Defendant's Motion To Dismiss for Failure To State A Claim Upon Which Relief Can Be Granted is appropriate and is hereby granted to Defendant Shimer by reason of the fact that as alleged in ¶s 102, 103 and 104 of Plaintiff's First Amended Complaint, the violation alleged by Tech which Shimer allegedly aided and abetted is inextricably tied to a finding that Shasta is a commodity pool. By reason of application of the required four part test set forth in controlling case law defendant Shimer's client Shasta is not a commodity pool and the relief, therefore, requested in Plaintiff's First Amended Complaint with respect to Defendant Shimer's violation of the Commodity Exchange Act as alleged in Count V cannot be granted.

5. With respect to Count V, in the alternative, the Court also finds that, in light of the substantial and credible evidence in the undisputed record of defendant Shimer's good faith and lack of any intention to further Tech's alleged violation of Regulation 4.30 Plaintiff cannot establish the requisite scienter required by applicable case law sufficient to support a finding by this Court that Shimer aided and abetted Tech's alleged violation of Regulation 4.30 and so, Summary Judgment, as requested by Defendant is also appropriate with respect to Plaintiff's allegation in that Shimer aided and abetted Tech's alleged violation of Regulation 4.30.

IT IS HEREBY ORDERED THAT:

Defendant's Motion to Dismiss For Failure To State A Claim Upon Relief Can Be Granted be entered in favor of Defendant Shimer with respect to all allegations contained in Counts I & II of Plaintiff's First Amended Complaint that Shimer violated Sections 4b(a)(2), 13(b) and 4o(1) of the Commodity Exchange Act.

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted be entered in favor of Defendant Shimer with respect to the allegation contained in Count III of Plaintiff's First Amended Complaint that Shimer violated Section 13(b) of the Commodity Exchange Act by inducing defendant Equity's alleged violation of Section 4m(1) and also similarly that Defendant Shimer violated Section

13(a) of the Commodity Exchange Act in that he aided and abetted defendant Equity's violation of Section 4m(1).

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted be entered in favor of Defendant Shimer with respect to the allegation contained in Count IV of Plaintiff's First Amended Complaint that Shimer violated Section 4k(2) of the Commodity Exchange Act in that defendant Shimer did not register as an AP of defendant Equity Financial Group.

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss For Failure to State A Claim Upon Which Relief Can Be Granted be entered in favor of Defendant Shimer with respect to the allegation contained in Count V of Plaintiff's First Amended Complaint that Shimer violated Section 13(a) of the Commodity Exchange Act in that defendant Shimer aided and abetted Defendant Tech's violation of Regulation 4.30.

IT IS FURTHER ORDERED that Defendant's Motion For Summary Judgment be also granted in favor of Defendant Shimer with respect to the allegation contained in Count V of Plaintiff's First Amended Complaint that Shimer violated Section 13(a) of the Commodity Exchange Act in that defendant Shimer aided and abetted Defendant Tech's violation of Regulation 4.30.

IT IS FURTHER ORDERED that aspects and provisions of this Court's previous Statutory Restraining Order and Asset Freeze found in Section I of the Court's Statutory Restraining Order and Order Appointing Receiver previously entered against Shimer, as Amended by that certain Consent Order of Preliminary Injunction and Other Ancillary Relief is hereby revoked and is of no longer any force and effect and is hereby rescinded by reason of the fact that Shimer is no longer a defendant in this matter.

IT IS FURTHER ORDERED that Shimer be immediately removed from receivership as previously ordered by Section II of this Court's Statutory Restraining Order and Order Appointing Receiver as Amended by that certain Consent Order of Preliminary Injunction and Other Ancillary Relief and that all further authority and power of the Court appointed equity receiver over Shimer and all authority of the receiver to require any delivery by Shimer in any manner as further stated in Section IV of this Court's previous said order is hereby rescinded and revoked as to Shimer by reason of the fact that Shimer is no longer a defendant in this matter.

IT IS FURTHER ORDERED that all powers of the Receiver as stated in Section III of this Court's Statutory Restraining Order and Order Appointing Receiver as those powers might be applied to Shimer are hereby rescinded and revoked as to Shimer by reason of the fact that Shimer is no longer a defendant in this matter.

IT IS FURTHER ORDERED that any requirement previously imposed upon Shimer to cooperate with the Receiver as required by Section V of this court's previous Statutory Restraining Order and Order Appointing Receiver as Amended by that certain Consent Order of Preliminary Injunction and Other Ancillary Relief is hereby revoked and rescinded as to Shimer by reason of the fact that Shimer is no longer a defendant in this matter.

IT IS FURTHER ORDERED that any requirement previously imposed upon Shimer as required by Section VI of this court's previous Statutory Restraining Order and Order Appointing Receiver to stay any claim, right or interest for, against, on behalf of, or in the name of Shimer as specified in paragraphs A through D of that Section VI as Amended by that certain Consent Order of Preliminary Injunction and Other Ancillary Relief is hereby revoked and rescinded as to Shimer by reason of the fact that Shimer is no longer a defendant in this matter.

SO ORDERED _____ May, 2005

UNITED STATES DISTRICT JUDGE